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In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Congress granted the Director of the Bureau of Prisons the power to create categories of inmates who are ineligible for consideration for early release under 18 U.S.C. § 3621(e)(2)(B).

(2) Whether the Director of the Bureau of Prisons may categorically deny Mr. Lopez, a nonviolent offender, from consideration for eligibility for early release under 18 U.S.C. § 3621(e)(2)(B).

PARTIES TO THE ACTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CALVERN J. BELLIS
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BRIAN TRACE SHIELDS
DAVID J. MILLER
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GEORGE COOK
RYAN SCOTT CLARK
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TIM WALKER
CHRISTOPHER A. LOPEZ,

Petitioners/Appellees,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and
FEDERAL BUREAU OF PRISONS,

Respondents/Appellants.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Action Before the United States Court of Appeals for the Eighth Circuit ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions Involved 2

Statement of the Case 6

Christopher A. Lopez 6

History of Title 18 U.S.C. § 3621(e) 8

Summary of Argument 17

Argument 18

I. THE BUREAU OF PRISONS' CATEGORICAL DENIAL OF ELIGIBILITY FOR EARLY RELEASE TO MR. LOPEZ VIOLATES THE PLAIN LANGUAGE OF 18 U.S.C. § 3621 AND THE UNAMBIGUOUSLY EXPRESSED INTENT OF CONGRESS 18

A. The plain language of 18 U.S.C. § 3621(e), and specifically subsection (2)(B), illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the sentence reduction incentive 19

TABLE OF CONTENTS – Continued

Page

B. The incentive of a one-year sentence reduction was an indispensable element of the overall drug treatment program for federal prisoners and illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the incentive 24

1. Congress made it clear that incentives were indispensable to the success of the drug treatment Program 25

2. The amendments to the bill evidence Congress's intent to limit the BOP's Discretion 29

II. THE RULE OF LENITY APPLIES TO THE INTERPRETATION OF 18 U.S.C. § 3621(e)(2)(B) IF CONGRESS'S INTENT IS DETERMINED TO BE AMBIGUOUS 32

Conclusion 33

Index to Appendix ..... App. i

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

SUPREME COURT CASES

Albernaz v. U.S., 350 U.S. 333 (1981) 32

Arthur v. Cumming, 91 U.S. 362 (1876) 19

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 18

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., ___ U.S. ___, 120 S. Ct. 1942 (2000) 18

Ladner v. U.S., 358 U.S. 169 (1958) 32

Russello v. U.S., 464 U.S. 16 (1983) 31

U.S. v. Bass, 404 U.S. 336 (1971) 32

U.S. v. Johnson, ___ U.S. ___, 120 S. Ct. 1114 (2000) 24, 30

United States v. LaBonte, 520 U.S. 751 (1997) 19

CIRCUIT COURT CASES

Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999) 1, 16

Bowen v. Hood, 202 F.3d 1211 (9th Cir. 2000) 16

Bush v. Pitzer, 133 F.3d 1066 (7th Cir. 1997) 15, 16

Downey v. Crabtree, 100 F.3d 662 (9th Cir. 1996) 15, 16

Kilpatrick v. Houston, 197 F.3d 1143 (11th Cir. 1999) 17

Lasorsa v. Menifee, 182 F.3d 900 (2nd Cir. 1999) 16

Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998) 7, 15, 16

Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998) 16

TABLE OF AUTHORITIES – Continued

Page

Parsons v. Pitzer, 149 F.3d 734 (7th Cir. 1998) 16

Pelissero v. Thompson, 170 F.3d 442 (4th Cir. 1997) 16

Roussos v. Menifee, 122 F.3d 159 (3rd Cir. 1997) ...15, 16

Rublee v. Fleming, 160 F.3d 213 (5th Cir. 1998) 16

United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972) 31

Venegas v. Henman, 126 F.3d 760 (5th Cir. 1997)..... 15

Ward v. Booker, 202 F.3d 1249 (10th Cir. 2000) 16

STATUTES & REGULATIONS

18 U.S.C. § 924(c)(3) 15

18 U.S.C. § 3621 ..... *passim*

21 U.S.C. § 841 15

28 U.S.C. § 1254(1) 1

28 C.F.R. § 550.58..... 5, 6, 15

OTHER AUTHORITIES

Bureau of Prisons Program Statement 5162.02 (July 24, 1995)..... 5, 16

Bureau of Prisons Program Statement 5162.04 (October 9, 1997) 5, 16, 20

Federal Bureau of Prisons *Quick Facts*..... 8

H.R. 3355, 103rd Cong., 2nd Sess. (1994) (enacted) .. 13, 14

TABLE OF AUTHORITIES – Continued

Page

H.R. Conf. Rep. No. 694, 103rd Cong., 2nd Sess. (1994) 13, 14, 25, 29

H.R. Conf. Rep. No. 711, 103rd Cong., 2nd Sess. (1994) 13

H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991) 9, 24, 26, 27

H.R. Rep. No. 320, 103rd Cong., 1st Sess. (1993) 13, 14, 24, 27, 28, 30

H.R. Rep. No. 489, 103rd Cong., 2nd Sess. (1994) 13, 25, 29

Pub. L. 101-647 9

Pub. L. 103-322 14

Sentencing Guidelines § 2D1.1, § 2D1.11 15

OPINIONS BELOW

On January 6, 1999, the Honorable Lawrence L. Piersol of the District of South Dakota, Southern Division, issued a Memorandum Opinion and Order granting the Petition for a Writ of Habeas Corpus to Petitioner Christopher A. Lopez. *Joint Appendix* at 8.

On August 10, 1999, the Court of Appeals for the Eighth Circuit reversed the decision of the District Court. *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999); *Id.* at 23. A Petition for rehearing and rehearing en banc was denied on September 16, 1999. *Id.* at 29.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner seeks review of the August 10, 1999 judgment of the Eighth Circuit Court of Appeals. *Joint Appendix* at 23. Petition for rehearing or rehearing en banc was denied by the Eighth Circuit on September 16, 1999. *Id.* at 23. A Petition for Certiorari was filed on December 15, 1999. Certiorari was granted by this Court on April 24, 2000. *Id.* at 30.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 18 U.S.C. § 3621(e)

§ 3621. Imprisonment of a convicted person.

* * *

e) Substance abuse treatment. –

(1) Phase-in. – In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare) –

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) Incentive for prisoners' successful completion of treatment program. –

(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) Period of custody. – The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

(3) Report. – The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain –

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of

prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) Authorization of appropriations. – There are authorized to be appropriated to carry out this subsection –

(A) $13,500,000 for fiscal year 1996;

(B) $18,900,000 for fiscal year 1997;

(C) $25,200,000 for fiscal year 1998;

(D) $27,000,000 for fiscal year 1999; and

(E) $27,900,000 for fiscal year 2000.

(5) Definitions. – As used in this subsection –

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population –

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems;

(B) the term "eligible prisoner" means a prisoner who is –

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

(6) Coordination of Federal assistance. – The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

2. 28 C.F.R. § 550.58 (1995).

See Appendix to Petitioner's Brief p. 1 ("App. 1").

3. 28 C.F.R. § 550.58 (1997).

See App. 3.

4. Bureau of Prisons Program Statement 5162.02 (July 24, 1995).

See App. 7.

5. Bureau of Prisons Program Statement 5162.04 (October 9, 1997).

See App. 29.

STATEMENT OF THE CASE

Christopher A. Lopez

The Petitioner, Christopher A. Lopez, was convicted of possession with intent to distribute methamphetamine. He is serving a 72-month sentence at the Federal Prison Camp in Yankton, South Dakota. Mr. Lopez is addicted to drugs.

Mr. Lopez requested treatment from the Bureau of Prisons for his substance abuse problem. Mr. Lopez was scheduled to enter the Bureau of Prison's (BOP's) Residential Drug Abuse Program. Congress requires the BOP to provide residential drug treatment to all federal prisoners with substance abuse problems. 18 U.S.C. § 3621(b). Lopez sought to take advantage of Congress's drug rehabilitation program, and the incentive provided by Congress for participation. Lopez hopes that by successfully completing the Residential Drug Abuse Program, he will qualify for a one-year sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B).

Lopez was informed that the BOP had classified him ineligible for the early release incentive under 28 C.F.R. 550.58 (1997) and BOP Program Statement 5162.04. *Joint Appendix* at 3, 5. Lopez was classified ineligible because he received a two-level sentence enhancement for possessing a firearm. *Id.*

Petitioner Lopez, along with nine other similarly situated prisoners, filed a petition seeking a writ of habeas corpus instructing the Warden of the Federal Prison Camp at Yankton, South Dakota to grant him a sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B).

The prisoners contention was that the BOP had exceeded the authority granted to it by Congress when the BOP ruled them categorically ineligible for sentence reductions under 18 U.S.C. § 3621(e)(2)(B). The prisoners contended they were eligible for consideration for a sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B) because they had not been convicted of a violent offense. As authority for their position, they cited the Eighth Circuit's decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998).

Judge Piersol granted Mr. Lopez's petition on January 6, 1999. *Joint Appendix* at 8, 21. The Judge ordered the BOP to re-evaluate Lopez for early release. *Id.* at 8. The District Court concluded that the BOP exceeded its statutory authority by categorically declaring certain inmates who had not been convicted of violent offenses ineligible for the early release incentive. *Id.*

The government appealed the District Court's decision to the Eighth Circuit Court of Appeals. The Petitioner's case was consolidated with that of the nine other inmates. The case was decided on August 10, 1999, by Judges Loken, Hansen and Morris Sheppard Arnold of the United States Court of Appeals for the Eighth Circuit. *Joint Appendix* at 23. The Circuit Court concluded that the BOP acted within its statutory authority in excluding Lopez from the early release program. *Id.*

Lopez remains in prison. His anticipated release date from prison is June 2, 2002.

History of Title 18 U.S.C. § 3621(e)

Mr. Lopez requests the Court to interpret 18 U.S.C. § 3621(e). The statute represents Congress's efforts to provide effective substance abuse treatment to federal prisoners. Section 3621(e) created the present drug treatment program for federal prisoners. The statute is the product of Congress's crime legislation debated during the early 1990's.

The United States prison population in federal facilities increased from 21,266 in 1970 to 106,536 inmates in May 1998. Federal Bureau of Prisons *Quick Facts*, updated April 2000. The population had increased to 122,126 by April 2000. *Id.* The predominant reason for the increase has been the application of the Sentencing Guidelines to drug users. *Id.*

The BOP reports that in 1970 only 16.3% of federal inmates were imprisoned for drug related offenses. *Id.* The percentage of inmates in federal prison for drug related offenses was an astounding 58.9% by 1998. *Id.* The prison population of drug offenders in 1970 was 3,466. *Id.* The prison population of drug offenders has increased an average of 3,400 each year since then. *Id.*

The number of federal inmates convicted of drug offenses rose 361% over a 28-year period. *Id.* The increase does not include those inmates jailed for crimes not characterized as drug offenses but for which drugs played an integral role in the offense. *Id.*

Congress determined that treatment was needed to assist in the rehabilitation of addicted prisoners. Congress reacted in 1990. The Crime Control Act of 1990,

Pub. L. 101-647, § 2903, amended the existing 18 U.S.C. § 3621(b), and Congress required the BOP to provide drug treatment to the prisoners in its custody. 104 Stat. 4913. The statutory amendment provided: "The Bureau [of Prisons] shall, to the extent practicable, make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." *Id.*

Some members of Congress believed that the 1990 legislation was not adequate to ensure effective drug treatment. *See* H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991). House Bill 548 was introduced during 1991 to intensify drug treatment for prisoners. *Id.*

H.R. 548 expanded Congress's directive that the BOP shall provide substance abuse treatment to all prisoners in its custody with substance abuse problems. *Id.* The bill ordered the BOP to provide all eligible prisoners treatment by 1995. *Id.* The bill also directed that sentence reductions were to be provided to those prisoners who successfully completed the rehabilitation program. *Id.*

A hearing on H.R. 548 was held by the Subcommittee on Crime and Criminal Justice on June 6, 1991. *Id.* Testimony was presented by the Director of the Bureau of Prisons, Michael J. Quinlan, and other authorities. The testimony demonstrated that substance abuse was a major cause of the overwhelming growth in the prison population during the 1980s. *Id.* The Subcommittee was informed that no substance abuse program would be successful without incentives for participation. *Id.*

The Judiciary Committee adopted H.R. 548, as submitted by the Subcommittee on Crime and Criminal Justice, and incorporated it into H.R. 3371, the Omnibus Crime Control Act of 1991 (renamed "Violent Crime Control and Law Enforcement Act of 1991"). *Id.* The Judiciary Committee endorsed the bill, stating that:

> There is an immense gap between what could be done to prevent crime with drug treatment and what is now being done by the Bureau of Prisons. . . . [A review of the evidence presented to the Subcommittee on Crime and Criminal Justice made it] clear that an incentive to participate in these rigorous treatment programs was essential. For that reason, a provision was included in [the bill] authorizing the Bureau of Prisons to reduce by up to one year the sentences of inmates completing a residential substance abuse program. . . . The Committee determined that a modest, appropriate incentive is necessary to ensure a high level of productive participation in the program.

Id.

H.R. 3371 passed the House of Representatives on November 27, 1991. H.R. Rep. No. 320, 103rd Cong., 1st Sess. 5 (1993). The Senate never voted on it, however, and it failed to become law. *Id.*

In spite of the Senate's failure to vote on the issue, the effort to provide drug treatment to federal prisoners continued in 1993. *Id.* An initiative to provide drug treatment to federal prisoners was again adopted by the House Judiciary Committee in 1993 as a separate bill,

H.R. 3350.[1] *Id.* This bill was substantially similar to H.R. 548, which the Judiciary Committee reported on in 1991. *Id.*

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[1] H.R. 3350 provided:

SECTION 1. SUBSTANCE ABUSE TREATMENT IN FEDERAL PRISONS.

Section 3621 of title 18, United States Code, is amended –

(1) in the last sentence of subsection (b), by striking ", to the extent practicable,"; and

(2) by adding at the end the following new subsection:

"(e) Substance Abuse Treatment. –

"(1) Phase-in. – In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall provide substance abuse treatment –

"(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

"(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

"(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

"(2) Incentive for prisoners' successful completion of treatment program. –

"(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provide under paragraph (1) of this subsection, shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions,

The House Judiciary Committee once again concluded that residential drug treatment programs for

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as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

"(B) Period of custody. – The period the prisoner remains in custody after successfully completing a treatment program shall not exceed the prison term the law would otherwise require such prisoner to serve, but may not be less than such term minus one year.

"(3) Report. – The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain –

"(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

"(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible, and

"(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

"(4) Authorization of appropriations. – There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this subsection.

"(5) Definitions. – As used in this subsection –

"(A) the term 'residential substance abuse treatment' means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set forth from the general prison population –

federal prisoners were necessary to reduce recidivism, ease prison overcrowding and ultimately prevent crime. *Id.* at 2. The Committee maintained the position that an incentive was necessary to ensure prisoners' participation, and thus, accomplish the legislation's goals. *Id.*

H.R. 3350 was subsequently included in a larger crime bill, the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355, 103rd Congress, 2nd Sess. (1994) (enacted). This Act was debated and amended throughout 1994. *See* H.R. Rep. No. 489, 103rd Cong., 2nd Sess. (1994); H.R. Conf. Rep. Nos. 694, 711 103rd Cong., 2nd Sess. (1994). The amendments did include a revision of that portion of the act dealing with substance abuse treatment in federal prisons. H.R. Conf. Rep. No. 694.

The version of the bill reported out May 2, 1994 was the same as H.R. 3350 relating to drug treatment. H.R. Rep. No. 489. However, House Conference Report No. 694 dated August 10, 1994, illustrates the amendments that were made to the bill prior to passage by both houses of Congress. This amended version of the bill is what

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"(i) directed at the substance abuse problems of the prisoner; and

"(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems; and

"(B) the term 'eligible prisoner' means a prisoner who is –

"(i) determined by the Bureau of Prisons to have a substance abuse problem; and

"(ii) willing to participate in a residential substance abuse treatment program." H.R. Rep. No. 320 at 5.

became 18 U.S.C. § 3621(e). H.R. 3355, 103rd Cong., 2nd Sess. (1994) (enacted).

There were two amendments to the bill before final passage that are vital to the proper resolution of Mr. Lopez's case.

The first noteworthy amendment was to subsection (e)(2)(A). The previous versions of the bill provided that a prisoner "shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions, as the Bureau deems appropriate." H.R. Rep. No. 320. The BOP had full discretion on the length of a prisoner's sentence. In the amended version, "for such time" was deleted, reducing the BOP's discretion. The bill no longer provided that the time a prisoner was to remain in prison was to be "for such time . . . as the Bureau deems appropriate." H.R. Conf. Rep. No. 694. The discretion granted by the bill changed.

Second, the amended version provided that only prisoners convicted of nonviolent offenses would be eligible for the early release incentive. *Id.*

The Violent Crime Control and Law Enforcement Act of 1994 was enacted on September 13, 1994, as Pub. L. 103-322. Section 32001(2) of Pub. L. 103-322 added section (e) to 18 U.S.C. § 3621 and created the current substance abuse treatment program for federal prisoners. 108 Stat. 1796, 1896.

Almost immediately after enactment of 18 U.S.C. § 3621(e), the BOP began interpreting the statute in a

manner inconsistent with the plain meaning of the statute. The BOP enacted 28 C.F.R. § 550.58 in May 1995, which interpreted Congress's proviso that only those inmates convicted of nonviolent offenses were eligible for a sentence reduction. App. 1. The BOP defined a nonviolent offense as the converse of a crime of violence as defined in 18 U.S.C. § 924(c)(3). *Id.* The BOP then adopted Program Statement 5162.02 (July 24, 1995) to implement the regulation. App. 7.

The Program Statement, entitled *Definition of Term, "Crimes of Violence,"* listed those crimes that, according to the BOP, are always crimes of violence. Section 7; App. 9-15. The Program Statement also stated that some crimes may be considered crimes of violence depending on the specific offense characteristics assigned. Section 9; App. 17-21. The most notable inclusion in this paragraph was the BOP's classification of a conviction for drug trafficking under 21 U.S.C. § 841 as a crime of violence if the defendant received a sentence enhancement for possession of a firearm pursuant to Sentencing Guidelines § 2D1.1 and § 2D1.11. *Id.* This triggered a flood of litigation because a conviction under 21 U.S.C. § 841 had never been characterized as a crime of violence. *See e.g., Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998); *Bush v. Pitzer*, 133 F.3d 1066 (7th Cir. 1997); *Venegas v. Henman*, 126 F.3d 760 (5th Cir. 1997); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996). Prisoners argued that the BOP had exceeded its authority by defining the phrase "crime of violence" in a manner inconsistent with existing statutory and case law. *Id.* The

prisoners contended that the BOP could not use sentencing factors to determine the nature of a prisoner's conviction. The courts agreed, and the majority of circuits held that the BOP had exceeded its authority by using sentencing factors to determine whether a conviction was for a crime of violence, and thus, not nonviolent. *Martin*, supra; *Bush*, supra; *Roussos*, supra; *Downey*, supra.

The BOP responded to the courts' rejection of Program Statement 5162.02 by amending 28 C.F.R. § 550.58 and adopting Program Statement 5162.04 (October 9, 1997). App. 3, 29. The BOP's present position is that because an enhancement cannot be used to classify drug possession as a crime of violence, the Director will use his discretionary power to exclude that same group of prisoners based on the discretion of the Director. Section 7; App. 40-53. The BOP maintains certain prisoners are categorically excluded from the incentive program based upon the Director's discretion. *Id.*

The interpretation by the BOP has created a new division of the circuits. Nine courts of appeal have considered the issue of whether the BOP has discretion to categorically exclude inmates like Petitioner Lopez who have not committed a crime of violence. *See Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999); *Lasorsa v. Menifee*, 182 F.3d 900 (2nd Cir. 1999) (Table, Text in WESTLAW, 1999 WL 459773); *Pelissero v. Thompson*, 170 F.3d 442 (4th Cir. 1997); *Rublee v. Fleming*, 160 F.3d 213 (5th Cir. 1998); *Parsons v. Pitzer*, 149 F.3d 734 (7th Cir. 1998); *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998); *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000);

Kilpatrick v. Houston, 197 F.3d 1143 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

The Director of the BOP contends that she has total discretion to determine whether Petitioner Lopez warrants individual consideration for the incentive program. App. 40-53. Mr. Lopez is categorically ineligible even though he has no violent conviction.

SUMMARY OF ARGUMENT

Congress established an expansive substance abuse program to be administered by the Bureau of Prisons. Congress enacted an incentive for inmates to take advantage of the programs. Congress directed that all inmates who were not convicted of a violent offense were to be considered for an early release incentive for completion of the residential drug abuse program.

The Bureau of Prisons through its rulemaking has declared nonviolent offenders categorically ineligible for the incentive of early release. This action by the Bureau of Prisons is in direct violation of Congress's intention. The statute unambiguously directs that all nonviolent offenders are eligible for consideration for an early release incentive. The Court need give no deference to the interpretation of the Bureau of Prisons because the intent of the statute is clear.

The Bureau of Prisons may not create categories of ineligible prisoners beyond the one category established by Congress in the absence of law clearly granting the Bureau of Prisons that authority.

The Court should reverse the Eighth Circuit Court of Appeals and hold that the statute does not grant the Bureau of Prisons the power to categorically deny an inmate convicted of a nonviolent offense consideration for eligibility for early release.

ARGUMENT

I. THE BUREAU OF PRISONS' CATEGORICAL DENIAL OF ELIGIBLITY FOR EARLY RELEASE TO MR. LOPEZ VIOLATES THE PLAIN LANGUAGE OF 18 U.S.C. § 3621 AND THE UNAMBIGUOUSLY EXPRESSED INTENT OF CONGRESS.

"Congress 'says in a statute what it means and means in a statute what it says.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, ___ U.S. ___, 120 S. Ct. 1942, 1947 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Congress has said: "that every prisoner with a substance abuse problem [shall] have the opportunity to participate in appropriate substance abuse treatment . . . " 18 U.S.C. § 3621(c)(1).

Congress has said: "the term 'eligible prisoner' means a prisoner who is (i) determined by the Bureau of Prisons to have a substance abuse problem; and (ii) willing to participate in a residential substance abuse program." 18 U.S.C. § 3621(e)(5)(B).

Congress has further said: "The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be

reduced by the Bureau of Prisoners, but such reduction may not be more than one year." 18 U.S.C. § 3621(e)(2)(B).

Congress meant that all prisoners are eligible for a sentence reduction incentive except (a) those who do not have a substance abuse problem, (b) those who have a problem but are unwilling to participate, or (c) those convicted of violent offenses.

Mr. Lopez has a substance abuse problem, wants to complete the substance abuse program to qualify for consideration for a sentence reduction, and was not convicted of a violent offense.

Congress, by stating which inmates are eligible, has declared which inmates are not. *Arthur v. Cumming*, 91 U.S. 362, 364 (1876) ("Expressio unius, exclusio alterius"). This statute is not ambiguous and no deference need be given to the agency interpretation. *United States v. LaBonte*, 520 U.S. 751 n6 (1997). Mr. Lopez is eligible for early release by the plain language of 18 U.S.C. § 3621(e).

A. The plain language of 18 U.S.C. § 3621(e), and specifically subsection (2)(B), illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the sentence reduction incentive.

The precise question at issue is "Who should be categorically excluded from eligibility for the sentence reduction?" Lopez submits that Congress explicitly answered this question in the plain language of 18 U.S.C. § 3621(e).

Subsection 3621(e)(2)(B) is Congress's one-year sentence reduction incentive for successful completion of

residential drug treatment.[2] This subsection grants eligibility for early release consideration to all prisoners convicted of nonviolent offenses.[3] It specifically refers to those prisoners "convicted of a nonviolent offense." The plain language of the statute is clear that those prisoners convicted of violent offenses are ineligible for a sentence reduction. Congress categorically excluded violent offenders. Congress has mandated that all other inmates are eligible upon completion of the program requirements.

The BOP contends that Congress has granted the Director of the BOP broad discretion to also determine who is categorically ineligible for early release. *See* Program Statement 5162.04; App. 29. A specific grant of authority is absent from Subsection 3621(e)(2)(B). The only reference to the BOP in Subsection 3621(e)(2)(B) is Congress's grant to the BOP of the authority to reduce sentences. The subsection states that sentences "may be reduced by the Bureau of Prisons, but such reduction

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[2] Title 18 U.S.C. § 3621(e)(2)(B) provides:

> (2) Incentive for prisoners' successful completion of treatment program. – * * *
>
> (B) Period of custody. – The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

[3] Petitioner Lopez was convicted of possession with intent to distribute methamphetamine. The BOP considers this a conviction for a nonviolent offense. *See* Program Statement 5162.04 (October 9, 1997) at App. 29.

may not be more than one year." The purpose of this subsection was to authorize the BOP to grant sentence reductions.

The BOP could not grant sentence reductions prior to 1994 because Congress had prohibited such reductions in 18 U.S.C. § 3621(a). Subsection (a) of 18 U.S.C. § 3621 provides that a person who has been sentenced by a court to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." The BOP is required to keep federal prisoners in custody until the term of imprisonment, as set by the sentencing judge, is completed. *Id.* Thus, Congress needed to enact Subsection (e)(2)(B) to permit the incentive to be granted to prisoners. Prior to the enactment of Subsection (e), the BOP could not reduce sentences upon successful completion of drug treatment. *See* § 3621(a). Section 3621(e)(2)(B) did not grant the BOP authority to determine who is ineligible for sentence reductions by creating the power to grant incentives. The power granted was to give reductions not the power to decide who was eligible to receive reductions.

Furthermore, a review of 18 U.S.C. § 3621 in its entirety does not support the broad grant of authority upon which the BOP relies. Subsection 3621(e)(2)(A) grants the BOP the power to alter the conditions of confinement of an inmate who has successfully completed

drug treatment as the Bureau deems appropriate.[4] The section does not modify the early release incentive. The subsection states that the determination of whether an inmate has successfully completed the residential substance abuse treatment program is left to "the judgment of the Director of the Bureau of Prisons." *Id.* Language relating to the Director's "judgment" is limited to only the determination of whether an inmate successfully completed the program.

The Court need only ask a few questions to determine whether Congress has spoken directly to the precise question at issue. The answers to the following questions make the proper interpretation of the statute quite clear:

- Does 18 U.S.C. § 3621 specifically state that federal prisoners shall receive drug treatment?

  Yes. *See* 18 U.S.C. § 3621(b).

[4] Title 18 U.S.C. § 3621(e)(2)(B) provides:

(2) Incentive for prisoners' successful completion of treatment program. –

(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

- Does 18 U.S.C. § 3621 specifically state that the BOP may give incentives for the prisoners' successful completion of drug treatment?

  Yes. *See* 18 U.S.C. § 3621(e)(2)(A)&(B).

- Does 18 U.S.C. § 3621 specifically state that a prisoner convicted of a nonviolent offense may have his sentence reduced?

  Yes. *See* 18 U.S.C. § 3621(e)(2)(B).

- Does 18 U.S.C. § 3621 specifically state that the BOP may, in its discretion, classify other classes of inmates as categorically ineligible?

  No.

Congress gave the BOP the power to determine whether an inmate had successfully completed drug treatment. 18 U.S.C. § 3621(e)(2)(A). Congress granted the BOP the power to keep inmates who successfully completed treatment in custody under conditions the BOP deems appropriate. *Id.* Congress also gave the BOP the power to grant sentence reductions which it did not have. 18 U.S.C. § 3621(e)(2)(B). If Congress wanted the BOP to reduce the categories of inmates eligible for the early release incentive (beyond the one identified by Congress), Congress would have specifically placed this grant of authority in the language of the statute. The fact that Congress did just that in granting the BOP the specific powers listed above proves this point.

The proper inference to be drawn is that Congress considered all the authority that could possibly be granted to the BOP with respect to the drug treatment programs. Congress then specifically listed that authority

which it intended to grant and omitted that authority which it did not intend to grant. *U.S. v. Johnson*, ___ U.S. ___, 120 S. Ct. 1114, 1118 (2000).

The Court need not look beyond the plain language of the statute to answer the threshold question in this analysis. Congress has directly spoken on the issue of who is eligible for consideration for the early release incentive of 18 U.S.C. § 3621(e)(2)(B).

The plain language of the statute illustrates that only those inmates convicted of violent offenses are categorically ineligible for early release, and therefore, Petitioner Lopez is eligible for consideration.

B. The incentive of a one-year sentence reduction was an indispensable element of the overall drug treatment program for federal prisoners and illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the incentive.

The legislative history of 18 U.S.C. § 3621(e) makes clear its purpose: Congress wanted to persuade all federal prisoners with substance abuse problems to successfully complete rehabilitation programs. Congress's goal was to reduce criminal recidivism. H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991); H.R. Rep. No. 320, 103rd Cong., 1st Sess. 5 (1993). The legislative history records the empirical data placed before Congress. *Id.* The data convinced Congress that providing incentives for participation in drug treatment programs was essential. *Id.* The legislative history is also highlighted by two

amendments to the legislation that ultimately became 18 U.S.C. § 3621(e). *Compare*, H.R. Rep. No. 489, 103rd Cong., 2nd Sess. (1994); H.R. Conf. Rep. Nos. 694 103rd Cong., 2nd Sess. (1994). First, Congress determined that all prisoners convicted of nonviolent offenses should be eligible for the sentence reduction incentive. *Id.* Second, Congress limited the BOP's discretion in determining periods of custody. *Id.* A review of the legislative history as a whole reveals that Congress never intended to grant the BOP the discretion to categorically exclude nonviolent inmates from consideration for a sentence reduction.

1. Congress made it clear that incentives were indispensable to the success of the drug treatment program.

Congress was well aware of the necessity of providing incentives to encourage drug treatment.

House of Representatives Report from the Committee on the Judiciary No. 102-242(I) documents the data Congress reviewed concerning substance abuse. The information presented to Congress suggested drug treatment as an effective method of crime prevention. *Id.* This data was compiled while the House Subcommittee on Crime and Criminal Justice was considering the first bill that carried the sentence reduction incentive, H.R. 3371, 102nd Cong., 1st Sess. (1991). *Id.*

The Judiciary Committee highlighted the importance of the following evidence presented to its Subcommittee:

> [S]ubstance abuse is a major cause of the tremendous growth in the Federal prison population over the past decade. Michael J. Quinlan,

> Director of the Federal Bureau of Prisons, testified at the hearing [before the Subcommittee] an estimated 30,000 of the 62,000 Federal inmates have substance abuse problems. Without treatment, studies indicate as many as 75 percent of these individuals will return to drug use within three months of release from prison, and about half will return to jail within three years. In contrast, the comprehensive Stay'N Out program at New York's Arthur Kill Correctional Facility has found that 78 percent of those inmates who undergo the full residential substance abuse treatment are still out of prison three years after release.

H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991).

The Judiciary Committee made the following conclusions after a review of the evidence with regard to offering incentives to inmates:

> Based upon the evidence presented at the hearing, it became clear that *an incentive to participate in these rigorous treatment programs was essential.* For that reason, a provision was included in this title authorizing the Bureau of Prisons to reduce by up to one year the sentences of inmates completing a residential substance abuse program. Three graduates of the Stay'N Out program testified at the hearing. They testified that prisoners induced by the prospect of an incentive to enter a substance abuse program often find in the program the support and resolve they need to overcome their drug problems. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort, and commitment from the inmate. The Committee determined that a modest,

> appropriate incentive is necessary to ensure a high level of productive participation in the program.

Id. (Emphasis added).

These findings and conclusions of the 102nd Congress were carried forward into the 103rd Congress. The Judiciary Committee reaffirmed the position of the Committee for the 102nd Congress and drafted House Report No. 320 to comment specifically on residential substance abuse treatment in federal prisons. The Committee echoed its previous findings:

> The link between substance abuse and crime is well-established. Drug addiction can increase an offender's rate of predatory criminal activity by 800 percent. . . . It is the Committee's belief that releasing an inmate into the community without treating his or her substance abuse problem while the inmate is in custody is to virtually guarantee future crime. . . . Since the Bureau of Prisons began its current substance abuse treatment program in 1990, it has treated only 6,000 of the more than 100,000 inmates who have been incarcerated in Federal institutions during that period. There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons.

H.R. Rep. No. 320, 103rd Cong., 1st Sess. at 2-3 (1993).

The Committee again commented specifically on the necessity of incentives to promote participation in the prison treatment programs:

H.R. 3350 also provides that the Bureau of Prisons may reduce, by up to one year, the sentence of an inmate who successfully completes the treatment program. The Committee believes such an incentive is necessary to draw into treatment many inmates who may otherwise not be willing to undergo a difficult and painful treatment program. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort, and commitment from the participants. The experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life opportunities, and will undertake to complete the program.

Id. at 4.

The legislative history of 18 U.S.C. § 3621(e) outlines the clear statistical data linking incentives for participation in drug treatment to successful drug treatment, which results in crime prevention. The incentive contained in 18 U.S.C. § 3621(e)(2)(B) was of monumental importance in the overall plan to provide inmates with drug treatment. The history illustrates a Congress disappointed by the BOP's lack of an effective drug treatment program.[5] The history illustrates a Congress intent on changing the system of drug treatment. Congress reviewed a system of drug treatment administered by the BOP with only 6,000 of the more than 50,000 inmates with

[5] "There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons." H.R. Rep. No. 320 at 3-4.

drug problems in treatment. *Id.* at 3. Congress did not intend for the BOP to establish categorical restrictions to reduce rather than increase drug treatment incentives. The history prior to the summer of 1994 indicates that Congress wanted the BOP to consider every inmate for a sentence reduction because the incentive would get the inmate through treatment and reduce his potential to re-offend.

2. The amendments to the bill evidence Congress's intent to limit the BOP's discretion.

The House and Senate debated the bill that would become 18 U.S.C. § 3621(e) throughout the summer of 1994. Congress specifically addressed the issue of which inmates should be eligible for the incentive program. The initial version of the proposed statute did not place any restrictions on inmate's eligibility. *See* H.R. Rep. No. 489. The bill was then amended in the summer of 1994 to its current state. *See* H.R. Conf. Rep. No. 694. Prisoners convicted of violent offenses would not be eligible.

Congress limited eligibility to a single category of inmates; "a prisoner convicted of a nonviolent offense." *Id.* Given the BOP's said history of drug treatment, Congress demanded widespread participation. Congress found that treating all drug abusers under BOP's control would reduce crime. Congress obviously realized that certain violent offenders must not be released early, however. Therefore, Congress made a specific exception to its overall policy that all prisoners should be given an incentive to participate in the drug program.

"When Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *U.S. v. Johnson*, ___ U.S. ___, 120 S. Ct. 1114, 1118 (2000). The proper inference is that "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Id.* Congress categorically excluded only inmates convicted of violent offenses because Congress wanted all prisoners to participate, and thereby, reduce crime in the future.

Another amendment that was made in the summer of 1994 was to delete the sentence reduction language from 18 U.S.C. § 3621(e)(2)(A). The pre-amendment version stated that a prisoner "shall remain in the custody of the Bureau *for such time* . . . and under such conditions, as the Bureau deems appropriate." H.R. Rep. No. 320. (emphasis added). The version reported in H.R. Conf. Rep. No. 694, which became 18 U.S.C. § 3621(e)(2)(A), states that a prisoner "shall remain in the custody of the Bureau under such conditions, as the Bureau deems appropriate." The amended and final version of that subsection makes no reference to the BOP having the authority to determine the length of time a prisoner will remain in custody after successful completion of the program. Discretion that was in the bill was removed by Congress prior to passage of the bill. This is further evidence of Congress denying the BOP discretion to determine prisoner eligibility for a sentence reduction.

The BOP claims that the word "may" in Subsection (e)(2)(B) grants the Director the same authority granted to her in (e)(2)(A). Subsection (A) grants the Director broad discretion in the management of the program using the terms "in the judgment of the Director" and "under such

conditions as the Bureau deems appropriate." Subsection (B) does not grant broad discretion similar to Subsection (A). Congress directed that the period of imprisonment of a nonviolent offender "may be reduced." This grant permits and assumes a reduction, but does not so require. Most importantly, the language has no grant of power to determine eligibility. No words allow the Director to limit eligibility to those she "deems appropriate" as in subsection (A).

The BOP urges the Court to find that in subsection (A), Congress's use of language such as "Director's judgment" and "deems appropriate" is equivalent to the use of the word "may" in subsection (B) and that Congress intended to grant the same authority in each. This Court has said that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 21 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In *Russello*, the Court went on to state: "We refrain from concluding here that the differing language in the two [consecutive] subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." The BOP is asking this Court to stray down the same path the Court refused to follow in *Russello*.

Both the amendment limiting eligibility for the sentence reduction and the amendment limiting the BOP's discretion demonstrate a clear intent by Congress to direct the BOP to enhance drug treatment efforts.

A comprehensive review of the legislative history demonstrates the importance Congress placed on the sentence reduction incentive. Congress was insistent on making determinations regarding eligibility for its programs, and Congress wanted to be very specific in the authority it granted to the BOP. Congress spoke directly to the question at issue in this case. Congress did not grant the Director of the BOP the authority to categorically exclude Petitioner Lopez from consideration for early release.

II. THE RULE OF LENITY APPLIES TO THE INTERPRETATION OF 18 U.S.C. § 3621(e)(2)(B) IF CONGRESS'S INTENT IS DETERMINED TO BE AMBIGUOUS.

The rule of lenity is a rule of statutory construction which provides that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when the intent of Congress is ambiguous. *Ladner v. U.S.*, 358 U.S. 169, 178 (1958). "The rule of lenity . . . applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. U.S.*, 350 U.S. 333, 342 (1981). The rule reflects " 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' " *U.S. v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967)).

Should this Honorable Court determine that Congress's intent is ambiguous as it relates to the sentence reduction contained in 18 U.S.C. § 3621(e)(2)(B), then the

Court should apply the rule of lenity and adopt the interpretation that favors the federal prisoner.

CONCLUSION

Petitioner Lopez respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals and order the Bureau of Prisons to consider Mr. Lopez for a sentence reduction in accordance with the Memorandum Opinion and Order of the District Court.

Dated this 27th day of June, 2000.

Respectfully submitted,

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APPENDIX

28 C.F.R. § 550.58 (1995) ..... App. 1

28 C.F.R. § 550.58 (1997) ..... App. 3

Bureau of Prisons Program Statement 5162.02 (July 24, 1995) ..... App. 7

Bureau of Prisons Program Statement 5162.04 (October 9, 1997) ..... App. 29

28 C.F.R. § 550.58 (1995)

§ 550.58 Consideration for early release.

An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this section, unless the inmate is an INS detainee, a pretrial inmate, a contractual boarder (for example, a D.C., State, or military inmate), or eligible for parole, or unless the inmate's current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3), or unless the inmate has a prior federal and/or state conviction for homicide, forcible rape, robbery, or aggravated assault.

(a) Eligibility.

(1) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs; and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act

and has not been found to have committed a prohibited act involving alcohol or drugs.

(2) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs; and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) Application.

(1) Inmates currently enrolled. Eligible inmates currently enrolled in a residential drug abuse treatment program shall automatically be considered for early release.

(2) Inmates who had previously completed program requirements. Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) Length of reduction.

(1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is

approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If, based upon a disciplinary finding or based on program needs (for example, the inmate has not established an adequate release plan), the Community Corrections Regional Administrator may retard or disallow any portion of the maximum 12 months for an inmate in a community-based program.

28 C.F.R. § 550.58 (1997)

§ 550.58 Consideration for early release.

An inmate who was sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense, and who is determined to have a substance abuse problem, and successfully completes a residential drug abuse treatment program during his or her current commitment may be eligible, in accordance with paragraph (a) of this section, for early release by a period not to exceed 12 months.

(a) Additional early release criteria.

(1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:

(i) INS detainees;

(ii) Pretrial inmates;

(iii) Contractual boarders (for example, D.C., State, or military inmates);

(iv) Inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses;

(v) Inmates who are not eligible for participation in a community-based program as determined by the Warden on the basis of his or her professional discretion;

(vi) Inmates whose current offense is a felony:

(A) That has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

(C) That by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

(D) That by its nature or conduct involves sexual abuse offenses committed upon children.

(2) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(3) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) Application.

(1) Inmates currently enrolled. Eligible inmates currently enrolled in a residential drug

abuse treatment program shall automatically be considered for early release.

(2) Inmates who had previously completed program requirements. Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) Length of reduction.

(1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If the inmate cannot fulfill his or her community-based treatment obligations by the presumptive release date, the Community Corrections Regional Administrator may adjust the presumptive release date by the minimum amount of time necessary to allow for fulfillment of the treatment obligations.

PS5162.02 DEFINITION OF TERM – CRIMES OF VIOLENCE

OPI: OGC
NUMBER: 5162.02
DATE: July 24, 1995
SUBJECT: Definition of Term, "Crimes of Violence"

1. PURPOSE AND SCOPE. To implement various portions of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) that make reference to "nonviolent offense," and "crime of violence," specifically, Section 20417, Notification of Release of Prisoners, Section 20405, Crediting of "Good Time," and Section 32001, Substance Abuse Treatment in Federal Prisons. This Program Statement defines "crime of violence" as that term is used in these sections of the VCCLEA. The definition includes broad statutory language, as well as a framework for determining which specific criminal offenses fall within the statutory definition.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. An inmate whose offense is a crime of violence will have that status reflected in his or her record and be subject to the limitations imposed by that status.

b. Case management staff will review relevant documents to determine whether an inmate has committed a crime of violence.

3. DIRECTIVES REFERENCED

P.S. 5322.09 Classification and Program Review of Inmates (03/10/94)

P.S. 5330.10 Drug Abuse Programs Manual, Inmate (05/25/95)

P.S. 5800.07 Inmate Systems Management Manual (12/24/91)

P.S. 5800.08 Receiving and Discharge Manual (06/15/93)

P.S. 5880.28 Sentence Computation Manual (CCCA of 1984) (02/21/92)

P.S. 5880.30 Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (07/16/93)

4. STANDARDS REFERENCED. None.

5. STATUTORY DEFINITION. Title 18 of the United States Code defines "crime of violence" in Section 924(c)(3) as follows:

" The term 'crime of violence' means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

6. CRIMINAL PROVISIONS OF THE UNITED STATES CODE. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The offenses contained within these titles that may be crimes of violence are listed in the various sections below. If a particular code section in these titles is not listed below, and case management staff

believe that the crime might be violent, they should contact Regional Counsel. Additionally, if a Judgment and Commitment Order references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, please contact Regional Counsel to determine whether the particular offense should be categorized as a "crime of violence."

Some of the Code sections may be listed in more than one section below; this duplication is indicated by an asterisk. In such cases, staff should check subsequent sections of the Program Statement to determine whether the offense is a "crime of violence."

7. CRIMINAL OFFENSES THAT ARE CRIMES OF VIOLENCE IN ALL CASES. Any conviction for an offense listed below should be categorized as a "crime of violence."

a. Title 18, United State Code Sections

§ 32 (destruction of aircraft)

§ 34 (penalty when death results)

§ 35(b) (conveying false information that harms human life)

§ 36 VCCLEA addition (firing weapons into group of persons)

§ 37 VCCLEA addition (violence at international airports)

§ 43(b) (animal enterprise terrorism causing death or injury)

§ 81 (arson w/in maritime jurisdiction)

§ 111 (assaulting officers of the United States)

§ 112(a) (assaulting foreign officials)

§ 113 (assaults w/in maritime jurisdictions)

§ 114 (maiming w/in maritime jurisdiction)

§ 115 (threatening family member of a federal official)

§ 175 (biological weapons)

§ 231 (civil disorders)

§ 245 (federally protected activities)

§ 247(a)(1) (damage to religious property/obstruction of exercise of religion)

§ 247(a)(2) (obstruction of persons in free exercise of religion)

§ 351 (assassination of cabinet and congress members)

§ 373 (soliciting to commit a violent act)

§ 753 (rescue of an inmate to prevent execution)

* § 842 (explosive materials) *

§ 844 (penalties)

§ 871 (threats against the President)

§ 875(a),(b),(c) (interstate communications)

§ 878 (threats against foreign officials)

§ 879 (threats against former presidents)

* § 922(a)(4), (a)(7), (a)(8), (b)(4), (b)(5), * (d)(1), (d)(2), (d)(4), (d)(8), (g),(o),(p) (firearms violations)

§ 924(c) (firearms used in violent or drug trafficking crimes)

§ 930(b) & (c) (possession of firearms in federal facilities)

§ 970(a) (damage of property owned by foreign governments)

§ 1091 (genocide)

§ 1111 (murder)

§ 1112 (manslaughter)

§ 1113 (attempt to commit murder or manslaughter)

§ 1114 (murder of officers)

§ 1116 (murder of foreign officials)

§ 1117 (conspiracy to murder)

§ 1118 VCCLEA addition (murder in correctional institution)

§ 1119 VCCLEA addition (foreign murder of US national)

§ 1120 VCCLEA addition (murder by escaped prisoner)

§ 1121 VCCLEA addition (murder by state or local officer)

§ 1201 (kidnapping)

§ 1203 (hostage taking)

§ 1204 (international parental kidnapping)

§ 1364 (interference by foreign commerce by violence)

§ 1365 (tampering with consumer products) except 1365(b),(c)

§ 1512(a) (killing witness or victim)

§ 1513 (retaliation against witness or victim)

§ 1581 (peonage)

§ 1583 (enticement into slavery)

§ 1584 (sale into servitude)

§ 1585 (slave trading)

§ 1587 (possession of slaves aboard a vessel)

§ 1588 (transporting slaves)

§ 1651 (piracy)

§ 1652 (citizens as pirates)

§ 1653 (aliens as pirates)

§ 1655 (assault on commander as pirates)

§ 1659 (attack to plunder a vessel)

§ 1661 (robbery ashore)

§ 1751 (assassination of president or staff)

§ 1792 (mutiny or riot)

§ 1859 (surveys interrupted)

§ 1864 (hazardous devices on federal lands)

§ 1958 (use of interstate commerce in murder for hire)

§ 1959 (violent crimes aiding racketeering)

§ 1991 (entering train to commit crime)

§ 1992 (wrecking trains)

§ 2101 (riots)

§ 2111 (special maritime jurisdiction)

§ 2113(d),(e) (bank robbery and incidental crimes)

§ 2114 (assault of person carrying mail)

§ 2115 (breaking into post office)

§ 2118(a),(b),(c) (robberies and burglaries involving controlled substances)

§ 2119 (crimes involving motor vehicles)

§ 2191 (cruelty to seamen)

§ 2231(b) (assault or resistance)

§ 2232(a) (destruction of property to prevent seizure)

§ 2233 (rescue of seized property)

§ 2241 (aggravated sexual abuse)

§ 2242 (sexual abuse)

§ 2244(a) (abusive sexual contact)

§ 2261 VCCLEA addition (interstate domestic violence)

§ 2275 (firing or tampering with vessels)

§ 2276 (breaking and entering vessels)

§ 2280 VCCLEA addition (violence against maritime navigation)

§ 2281(NOT (A)), VCCLEA addition (violence against fixed platforms)

§ 2332 (penalties for homicide)

§ 2332a VCCLEA addition (use of weapons of mass destruction)

§ 2340A (torture)

§ 2383 (rebellion or insurrection)

§ 2384 (sedition conspiracy)

§ 2385 (advocating the overthrow of the government)

§ 2389 (recruiting for service against U.S.)

§ 2390 (enlistment to serve against U.S.)

§ 2421 (transportation for illegal sexual activity)

§ 2422 (coercion into interstate travel for illegal sexual activity)

§ 2423 (transportation of minors for illegal sexual activity)

b. Title 21 United States Code Sections

* § 841(e) (boobytraps on federal property) *

§ 848(e) (death penalty for criminal offenses)

§ 858 (endangering human life while manufacturing controlled substances)

* c. Title 26 United States Code Sections *

§ 5861(a)-(l) (firearms)

d. Title 42 United States Code Sections

§ 2283(a) (protection of nuclear inspectors)

§ 2284(a) (sabotage of nuclear facilities)

§ 3631 (interference with housing)

e. Title 49 United States Code Sections

§ 46502 (aircraft piracy)

§ 46504 (interference with flight crew members)

§ 46505(c) (carrying a weapon on an aircraft)

§ 46507 (false information and threats)

8. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE BASE OFFENSE LEVEL ASSIGNED. Convictions for an offense listed below may or may not have involved the use, attempted use, or threat of force, or presented the substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if an offense listed below involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular United States Sentencing Guideline provision that distinguishes between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant . . . . in the free exercise or enjoyment of any right or privilege . . . .

This crime could be committed through the use of force or threat of use of force, or not, since one can be oppressed through means other than force. Pursuant to United States Sentencing Guideline Section 2H2.1, if the crime involved obstructing an election or registration and the obstruction occurred using force or threat of force

against persons or property, the base offense level is 18. If the obstruction occurred through non-violent means, such as forgery, fraud, theft, deceit, etc., the base offense level is 12. If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense was a crime of violence. If the Presentence Investigation Report does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for violence. Accordingly, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report may reveal no mention of violence. When the Presentence Investigation Report fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

A list of offenses for which the Sentencing Guidelines base offense level is affected by the presence of violence follows:

Title 18 United States Code Sections

§ 33 (destruction of motor vehicles or facilities)

§ 241 FOR OTHER THAN CONSPIRACY (conspiracy against rights)

§ 242 (deprivation of rights under color of law)

§ 592 (putting troops at polls)

§ 593 (interference by armed forces)

§ 1791 (possessing contraband in prison)

§ 1952 (transporting items in aid of racketeering)

§ *2116 (railway or steamboat post office)

§ 2231(a) (assault on persons executing search warrant)

§ 2381 (treason)

9. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE SPECIFIC OFFENSE CHARACTERISTIC ASSIGNED. Convictions for an offense listed below, like those listed in Section 8 above, may or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

* Example: Section 841 of Title 21 United States Code makes it a* crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a

dangerous weapon was possessed during commission of the offense, the court would increase the defendant's base offense level by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs (21 U.S.C. § 841), and receives a two level enhancement for possession of a firearm has been convicted* of a "crime of violence." *

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for violence. Alternatively, the Presentence Investigation Report may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report reveals no mention of violence. If this occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Example: The Presentence Investigation Report in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of violence:

a. Title 16 United States Code Sections

§ 773e(a)(2),(3),(4),(6) (violation of Northern Pacific Halibut Act)

§ 773g (violation of Northern Pacific Halibut Act)

§ 1857(a)(D),(E),(F),(H) (violation of National Fishery Management Program)

§ 1859 (violation of National Fishery Management Program)

§ 2435(4),(5),(6),(7) (violation of Antarctic Marine Living Resources Convention)

§ 2438 (violation of Antarctic Marine Living Resources Convention)

§ 3606 (violation of North Atlantic Salmon Fishing)

§ 3637(a)(2),(3),(4),(6),(c) (violation of Pacific Salmon Fishing)

§ 5009(5),(6),(7),(8) (violation of North Pacific Anadromous Stock Convention)

§ 5010(b) (violation of North Pacific Anadromous Stock Convention)

b. Title 18 United States Code Sections

§ 755 (officer permitting escape)

§ 757 (procures escape for prisoner of war)

§ 874 (kickbacks from public works employees)

§ 894 (extending credit through extortionate means)

§ 1163 (embezzlement/theft from Indian organizations)

§ 1503 (influencing or injuring officer or juror)

§ 1505 (obstruction of proceedings before departments or agencies)

§ 1511 (obstruction of state or local law enforcement)

§ 1516 (obstruction of a federal audit)

§ 1517 (obstructing financial examination)

§ 1951 (interference with commerce by threats or violence)

§ 2112 (robbery of personal property of United States)

§ *2116 (breaking into a mail car)

c. Title 21 United States Code Sections

§ 841(NOT (e)), (controlled substance violation)

§ *846 (attempt and conspiracy)

d. Title 26 United States Code Sections

§ 7212 (attempt to interfere with revenue laws)

§ 7214 (unlawful acts by employees of the IRS)

e. Title 30 United States Code Sections

§ 1461(a)(3),(4),(5),(7) (resisting officers for violations under Deep Seabed Mineral Resources Act)

§ 1463 (violations of Deep Seabed Mineral Resources Act)

f. Title 33 United States Code Section

§ 1232(b)(2) (ports and waterways safety enforcement provisions)

g. Title 40 United States Code Section

§ 193f(a) (security of Capitol grounds and buildings)

h. Title 42 United States Code Sections

§ 1973aa (application of prohibition to other States)

§ 1973aa-1 (residence requirements for voting)

§ 1973aa-1a (bilingual election requirements)

§ 1973aa-3 (penalty)

§ 1973bb (enforcement of twenty-sixth amendment)

§ 1973gg-10 (criminal penalties)

§ 2283(b) (protection of nuclear inspectors)

§ 19151(2),(3),(4),(5) (violation of Ocean Thermal Energy Conversion Act)

§ 9152(d) (violation of Ocean Thermal Energy Conversion Act)

i. Title 46 United States Code Section

§ 1903 (Manufacture, Distribution, or possession with intent to manufacture controlled substances)

j. Title 49 United States Code Section

§ 46505(b) (carrying a weapon on an aircraft)

10. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON A VARIETY OF FACTORS.

In addition to the two lists in Sections 8 and 9 above, there are several more code sections that can be violated with or without force. For the crimes listed below, the Sentencing Guidelines provide little insight into the court's findings on this issue. Accordingly, rather than simply examining the base offense level or the specific offense characteristics, case managers must carefully examine the entire Offense Computation section of the Presentence Investigation Report, and, if necessary, the Offense Conduct section, to determine whether the offense was violent.

For the sections listed below, staff should look carefully to see if the offense was committed through the use or threatened use of force against a person or property, or whether commission of the offense involved a substantial risk that force would be used against a person or property.

* Some of the statutes listed in this section cover conspiracy* offenses, (see, e.g., 18 U.S.C. § 371 and 21 U.S.C. § 846) where an individual has planned with others to commit a particular crime. Other listed statutes cover attempt offenses (see, e.g., 21 U.S.C. §§ 846 and 963) where an individual tried but did not succeed in committing a particular crime. In order to determine whether one [sic] these offenses is violent, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would be classified as violent pursuant to the provisions of this program statement, e.g., murder, then the attempt or the conspiracy offense is also violent. The underlying offense may be noted on the Judgment and

Commitment Order and will certainly be included in the Presentence Investigation Report.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy)" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) using the categories in this program statement. As noted in the example on Section 9, if the Presentence Report indicates that the defendant received a 2 level increase for possessing a dangerous weapon ("Specific Offense Characteristic" for guideline § 2D1.1 or 2D1.11 applicable to 21 U.S.C. § 841 violations), then the offense should be deemed violent; if no such enhancement was given, the offense should be deemed nonviolent.

There are some statutes that do not criminalize behavior, but rather set out penalties that will result from violating other statutes.

Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever "knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both."

The Judgment and Commitment Order may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, will note the underlying conviction, e.g., "Transporting a Destructive Device in Interstate Commerce" (18 U.S.C. § 922(a)(4)). In

order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance with the provisions of this policy; if the underlying offense is violent, then the offender * should be deemed violent. *

Below is a list of offenses that may be violent depending on a variety of factors.

a. Title 7 United States Code Section

§ 473c-1 (offenses in relation to sampling of cotton)

b. Title 16 United States Code Sections

§ 5106(e)(5),(6),(7),(9),(f)(2) (violation of Atlantic Coast Fisheries Cooperative Management)

c. Title 18 United States Code Sections

§ 241 if conspiracy (conspiracy to deprive of civil rights)

§ 371 (conspiracy to commit offense or fraud against United States)

§ 372 (conspiracy to impede or inure officer)

§ 700 (desecration of the flag of the United States)

§ 751 (escape from federal prison)

§ 752 (instigating or assisting escape from federal prison)

§ 831 (prohibited acts involving nuclear materials)

§ 876 (mailing threatening communications)

§ 877 (mailing threatening communications from foreign country)

§ 924 (penalties for firearms violations)

§ 1153 (offenses within Indian Country)

§ 1512(b) (tampering with a witness/victim/informant)

§ 1708 (theft or receipt of stolen mail)

§ 1792 (mutiny and riot in prison)

§ 1956 (money laundering)

§ 1962 (racketeering)

§ 2117 (breaking into carrier facilities)

§ 2118(d) (robberies involving controlled substances)

§ 2152 (destruction of submarine and torpedo works)

§ 2153 (destruction of war materials)

§ 2154 (production of defective war material)

§ 2155 (destruction of national defense materials)

§ 2156 (production of defective national defense material)

§ 2192 (incitation of seamen to revolt)

§ 2193 (mutiny)

§ 2247 (repeat offenders)

§ 2387 (activities involving armed forces)

d. Title 21 United States Code Sections

§ *846 (attempt and conspiracy)

§ 848 (controlled substances violations as criminal enterprise)

§ 963 (conspiracy or attempt to violate controlled substance laws)

e. Title 40 United States Code Sections

§ 193f(a),(b) (security of Capitol grounds and buildings)

f. Title 42 United States Code Section

§ 2000(e)(13) (killing of officer while enforcing Equal Employment Act)

11. TITLE 18 UNITED STATES CODE SECTION 2113(a).

Title 18 United States Code Section 2113(a) provides in pertinent part:

Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . shall be fined under this title or imprisoned not more than twenty years, or both.

This statute covers various offenses, including not only bank robbery, but embezzling bank funds, stealing bank property and bank larceny.

With regard to the specific crime of bank robbery, the offense should be considered a crime of violence pursuant to section 924(c)(3) since, due to the circumstances surrounding bank robberies, the offense involves an explicit or implicit threat of force and thus has as an element [sic] the "threatened use of physical force against the person or property of another."

However, as to other offenses covered by 18 U.S.C. § 2113(a), (e.g. bank larceny), similar to offenses in Section 9, defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if a firearm was discharged, if a firearm or other dangerous weapon was brandished, displayed, possessed or used or if an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6). If a defendant received such an enhancement (or one of the other enhancements involving violence), the crime should be deemed "violent."

12. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are, generally, not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in sections 8 through 10 above that were committed before this date, case managers must make their own determination, based on the narrative description of the crime contained in the Presentence Investigation Report, whether the crime has as an element the use of force or threat of force, or the offense, by its nature, posed a substantial risk that force would be used (see definition in 18 U.S.C. § 924(c)(3) quoted above).

13. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the United States Sentencing Commission drafts

new guidelines. The above lists will be updated periodically to reflect legislative changes.

/s/
Kathleen M. Hawk
Director

PS 5162.04 CATEGORIZATION OF OFFENSES

OPI: OGC

NUMBER: 5162.04

DATE: October 9, 1997

SUBJECT: Categorization of Offenses

1. PURPOSE AND SCOPE. To assist in the implementation of various Federal Bureau of Prisons policies and programs. Section 6 of this Program Statement lists offenses the Bureau categorizes as crimes of violence as that term is used in various statutes. In addition, Section 7 lists offenses that in the Director's discretion shall preclude an inmate's receiving certain Bureau program benefits.

2. PROGRAM OBJECTIVE. The expected result of this program is:

An inmate will be denied the benefits of certain programs if his or her offense is either a crime of violence or an offense identified at the discretion of the Director of the Bureau of Prisons.

3. DIRECTIVES AFFECTED

a. Directive Rescinded

OM 149-96 (5162) Release Procedures for Inmates Eligible for Sentence Reduction Under 18 U.S.C. § 3621(e) in the Ninth Circuit (12/24/96)

b. Directives Referenced

PS 5110.11 Notification of Release to State and Local Law Enforcement Officials (10/31/95)

PS 5162.02 Definition of Term, Crimes of Violence (7/24/95)

PS 5322.09 Classification and Program Review of Inmates (3/10/94)

PS 5330.10 Drug Abuse Programs Manual, Inmate (5/25/95)

PS 5390.07 Intensive Confinement Center Program (4/24/96)

PS 5800.07 Inmate Systems Management Manual (12/24/91)

PS 5800.08 Receiving and Discharge Manual (6/15/93)

PS 5880.28 Sentence Computation Manual (CCCA of 1984) (2/21/92)

PS 5880.30 Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (7/16/93)

4. STANDARDS REFERENCED. None.

5. APPLICATION. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The offenses contained in these titles that may be crimes of violence are listed in Section 6. Section 7 lists offenses that are not categorized as crimes of violence, but would nevertheless preclude an inmate's receiving certain Bureau program benefits at the Director's discretion.

Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs,

such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, indicate that an inmate may be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7. When an inmate may be denied a program benefit under either Section 6 or 7, staff must carefully explain the basis for the denial. For example, if an inmate is convicted of an offense listed in Section 7, the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

If a particular Code section in these titles is not listed in Section 6 or Section 7, and case management staff believe the crime might be violent, or might preclude an inmate's receiving certain Bureau program benefits, they shall contact legal staff at the institution or the Regional Counsel. Also, if a Judgment and Commitment Order (J&C) references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, they should contact legal staff at the institution or the Regional Counsel to determine whether a recommendation should be made to change the policy to incorporate the offense in question.

Some of the Code sections may be listed in more than one section below; such duplication is indicated by an asterisk. In such cases, staff are to check subsequent sections of the Program Statement to determine whether the offense is a crime of violence or an offense that would otherwise preclude an inmate's receiving certain Bureau program benefits.

6. OFFENSES CATEGORIZED AS CRIMES OF VIOLENCE

a. Criminal Offenses That are Crimes of Violence in All Cases. Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs, such as early release pursuant to 18 U.S.C. § 3621(e), indicate that an inmate could be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7.

Any conviction for an offense listed below is categorized as a crime of violence.

(1) Title 18, United State Code Sections

§ 32 destruction of aircraft

§ 34 penalty when death results

§ 35(b) conveying false information that harms human life

§ 36 firing weapons into group of persons (VCCLEA addition)

§ 37 violence at international airports (VCCLEA addition)

§ 43(b) animal enterprise terrorism causing death or injury

§ 81 arson w/in maritime jurisdiction

§ 111 assaulting officers of the United States

§ 112(a) assaulting foreign officials

§ 113 assaults w/in maritime jurisdictions

§ 114 maiming w/in maritime jurisdiction

§ 115 threatening family member of a federal official

§ 175 biological weapons

§ 231 civil disorders

§ 245 federally protected activities

§ 247(a)(1) damage to religious property/obstruction of exercise of religion

§ 247(a)(2) obstruction of persons in free exercise of religion

§ 351 assassination of cabinet and congress members

§ 373 soliciting to commit a violent act

§ 753 rescue of an inmate to prevent execution

§ 842 explosive materials

§ 844 penalties

§ 871 threats against the President

§ 875(a), (b), (c) interstate communications

§ 878 threats against foreign officials

§ 879 threats against former presidents

§ 922(a)(4), (a)(7), (a)(8), (b)(4), (b)(5), (d)(1), (d)(2), (d)(4), (d)(8), (o), (p) firearms violations

§ 924(c) firearms used in violent or drug trafficking crimes

§ 930(b)&(c) possession of firearms in federal facilities

§ 970(a) damage of property owned by foreign governments

§ 1091 genocide

§ 1111 murder

§ 1112 manslaughter

§ 1113 attempt to commit murder or manslaughter

§ 1114 murder of officers

§ 1116 murder of foreign officials

§ 1117 (conspiracy to murder)

§ 1118 murder in correctional institution (VCCLEA addition)

§ 1119 foreign murder of US national (VCCLEA addition)

§ 1120 murder by escaped prisoner (VCCLEA addition)

§ 1121 murder by state or local officer (VCCLEA addition)

§ 1201 kidnapping

§ 1203 hostage taking

§ 1204 international parental kidnapping

§ 1364 interference by foreign commerce by violence

§ 1365 tampering with consumer products except 1365(b), (c)

§ 1512(a) killing witness or victim

§ 1513 retaliation against witness or victim

§ 1581 peonage

§ 1583 enticement into slavery

§ 1584 sale into servitude

§ 1585 slave trading

§ 1587 possession of slaves aboard a vessel

§ 1588 transporting slaves

§ 1651 piracy

§ 1652 citizens as pirates

§ 1653 aliens as pirates

§ 1655 assault on commander as pirates

§ 1659 attack to plunder a vessel

§ 1661 robbery ashore

§ 1751 assassination of president or staff

§ 1792 mutiny or riot

§ 1859 surveys interrupted

§ 1864 hazardous devices on federal lands

§ 1958 use of interstate commerce in murder for hire

§ 1959 violent crimes aiding racketeering

§ 1991 entering train to commit crime

§ 1992 wrecking trains

§ 2101 riots

§ 2111 special maritime jurisdiction

§ 2113(d), (e) bank robbery and incidental crimes

§ 2114 assault of person carrying mail

§ 2115 breaking into post office

§ 2118(a), (b), (c) robberies and burglaries involving controlled substances

§ 2119 crimes involving motor vehicles

§ 2191 cruelty to seamen

§ 2231(b) assault or resistance

§ 2232(a) destruction of property to prevent seizure

§ 2233 rescue of seized property

§ 2241 aggravated sexual abuse

§ 2242 sexual abuse

§ 2244(a) abusive sexual contact

§ 2245 sexual abuse resulting in death (VCCLEA addition)

§ 2261 interstate domestic violence (VCCLEA addition)

§ 2275 firing or tampering with vessels

§ 2276 breaking and entering vessels

§ 2280 violence against maritime navigation (VCCLEA addition)

§ 2281(NOT(A))violence against fixed platforms (VCCLEA addition)

§ 2332 penalties for homicide

§ 2332a use of weapons of mass destruction (VCCLEA addition)

§ 2340A torture

§ 2383 rebellion or insurrection

§ 2384 sedition conspiracy

§ 2385 advocating the overthrow of the government

§ 2389 recruiting for service against U.S.

§ 2390 enlistment to serve against U.S.

§ 2421 transportation for illegal sexual activity

§ 2422 coercion into interstate travel for illegal sexual activity

§ 2423 transportation of minors for illegal sexual activity

(2) Title 21 United States Code Sections

§ 841(e) boobytraps on federal property

§ 848(e) death penalty for criminal offenses

§ 858 endangering human life while manufacturing controlled substances

(3) Title 26 United States Code Sections

§ 5861(a) thru (l) firearms

(4) Title 42 United States Code Sections

§ 2000(e)(13) killing of officer while enforcing Equal Employment Act

§ 2283(a) protection of nuclear-inspectors

§ 2284(a) sabotage of nuclear facilities

§ 3631 interference with housing

(5) Title 49 United States Code Sections

§ 46502 aircraft piracy

§ 46504 interference with flight crew members

§ 46505(c) carrying a weapon on an aircraft

§ 46507 false information and threats

b. * Title 18, United States Code Section 2113(a). Title 18, United States Code Section 2113(a) provides in part:

"Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . shall be fined under this title or imprisoned not more than twenty years, or both."

This statute covers various offenses, including not only bank robbery but also embezzling bank funds, stealing bank property, and bank larceny.

With regard to the specific crime of bank robbery, the offense shall be considered a crime of violence, since the offense involves an explicit or implicit threat of force and thus has as an element the threatened use of physical force against the person or property of another. For offenses pursuant to § 2113(a) other than bank robbery, see Section 7.e. below.

c. Conspiracy, Attempt, and Similar Offenses Which Involve an Underlying Offense. The statutes listed in this section cover conspiracy offenses (see, e.g., 18 U.S.C. § 371) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses, i.e. when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense is categorized as violent pursuant to Section 6.a. of this Program Statement, e.g., murder, then the attempt or the conspiracy offense is also violent. The underlying offense will be included in the PSI and may be noted on the J&C.

Other statutes listed in this section do not criminalize behavior but set out penalties that result from violating other statutes.

Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever "knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both."

The J&C may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, notes the underlying conviction, "Transporting a Destructive Device in Interstate Commerce" [18 U.S.C. § 922(a)(4)]. In order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance

with Section 6.a. of this Program Statement; if the underlying offense is violent, then the offender should be deemed violent.

The following offenses may be violent depending on the underlying offense.

Title 18, United States Code Sections

§ *241 conspiracy to deprive civil rights (if conspiracy)

§ *371 conspiracy to commit offense/fraud against U.S.

§ *372 conspiracy to impede or inure officer

§ *924 penalties for firearms violations

§ *1962 racketeering

§ *2118(d) robberies involving controlled substances

7. OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or Section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under

the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

a. Criminal Offenses with an Enhanced Base Offense Level. Convictions for an offense listed below may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether an offense listed below involved the use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular U.S. Sentencing Guideline provision that distinguishes

between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

"If two or more persons conspire to injure, oppress, threaten or intimidate any person . . . in the free exercise or enjoyment of any right or privilege. . . . "

This crime may or may not be committed through the use of force or threatened use of force, since one can be oppressed through means other than force. Pursuant to U.S. Sentencing Guideline Section 2H2.1:

if the crime involved obstructing an election or registration, and the obstruction occurred using force or threat of force against persons or property, the base offense level is 18, or

if the obstruction occurred without the use or threatened use of force, such as forgery, fraud, theft, deceit, etc., the base offense level is 12.

If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense would preclude the inmate from receiving certain Bureau program benefits. If the PSI does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for the use or threatened

use of force. Accordingly, it is possible that an examination of the Offense Computation section of the PSI may reveal no mention of the use or threatened use of force. When the PSI fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. A list of offenses for which the Sentencing Guidelines base offense level is affected by the use or threatened use of force follows. At the Director's discretion, inmates with such an offense shall be precluded from receiving certain Bureau program benefits.

Title 18, United States Code Sections

§ 33 destruction of motor vehicles or facilities

§ 241 conspiracy against rights (for other than conspiracy)

§ 242 deprivation of rights under color of law

§ 592 putting troops at polls

§ 593 interference by armed forces

§ 1791 possessing contraband in prison

§ 1952 transporting items in aid of racketeering

§ *2116 railway or steamboat post office

§ 2231(a) assault on persons executing search warrant

§ 2381 treason

b. Criminal Offenses with a Specific Offense Characteristic Enhancement. Convictions for an offense listed below, like those listed in Section 7.a., may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has

been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

In some cases, an inmate may be convicted of an offense listed in this section as well as 18 U.S.C. § 924(c)(1), use of a firearm during a crime of violence or drug trafficking crime. According to the U.S. Sentencing Guidelines, if a defendant receives a § 924(c)(1) conviction, the court may not assess a two-level "Specific Offense Characteristic" enhancement for possession of a firearm; however, in light of the Supreme Court ruling in Bailey v. U.S., 116 S.Ct. 501 (1995), a number of § 924(c)(1) convictions have been vacated. In Bailey, the Court held that the term "use" connotes an active employment of the firearm. If any of the offenses listed in this section were accompanied by a § 924(c)(1) conviction that was subsequently vacated due to the Bailey decision, staff shall presume that the inmate would have received a two-level "Specific Offense Characteristic" enhancement for possession of a firearm unless there is a specific court order to the contrary. Thus, absent a court order specifically denying the application of a two point enhancement for possession of a firearm, the inmate will not receive certain Bureau program benefits.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for the use of force. Alternatively, the PSI may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the PSI reveals no mention of the use of force. If this

occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Example: The PSI in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of force:

(1) Title 16, United States Code Sections

§ 773e(a)(2), (3), (4), (6) violation of Northern Pacific Halibut Act

§ 773g violation of Northern Pacific Halibut Act

§ 1857(a)(D), (E), (F), (H) violation of National Fishery Management Program

§ 1859 violation of National Fishery Management Program

§ 2435(4), (5), (6), (7) violation of Antarctic Marine Living Resources Convention

§ 2438 violation of Antarctic Marine Living Resources Convention

§ 3606 violation of North Atlantic Salmon Fishing

§ 3637(a)(2), (3), (4), (6), (c) violation of Pacific Salmon Fishing

§ 5009(5), (6), (7), (8) violation of North Pacific Anadromous Stock Convention

§ 5010(b) violation of North Pacific Anadromous Stock Convention

(2) Title 18, United States Code Sections

§ 755 officer permitting escape

§ 757 procures escape for prisoner of war

§ 874 kickbacks from public works employees

§ 894 extending credit through extortionate means

§ 1163 embezzlement/theft from Indian organizations

§ 1503 influencing or injuring officer or juror

§ 1505 obstruction of proceedings before departments or agencies

§ 1511 obstruction of state or local law enforcement

§ 1516 obstruction of a federal audit

§ 1517 obstructing financial examination

§ 1951 interference with commerce by threats/violence

§ 2112 robbery of personal property of United States

§ *2116 breaking into a mail car

(3) Title 21, United States Code Sections

§ 841(NOT(e)),controlled substance violation

§ *846 attempt and conspiracy

(4) Title 26, United States Code Sections

§ 7212 attempt to interfere with revenue laws

§ 7214 unlawful acts by employees of the IRS

(5) Title 30, United States Code Sections

§ 1461(a)(3), (4), (5), (7) resisting officers for violations under Deep Seabed Mineral Resources Act

§ 1463 violations of Deep Seabed Mineral Resources Act

(6) Title 33, United States Code Section

§ 1232(b)(2) ports and waterways safety enforcement provisions

(7) Title 40, United States Code Section

§ 193f(a) security of Capitol grounds and buildings

(8) Title 42, United States Code Sections

§ 1973aa application of prohibition to other States

§ 1973aa-1 residence requirements for voting

§ 1973aa-1a bilingual election requirements

§ 1973aa-3 penalty

§ 1973bb enforcement of twenty-sixth amendment

§ 1973gg-10 criminal penalties

§ 2283(b) protection of nuclear inspectors

§ 19151(2), (3), (4), (5) violation of Ocean Thermal Energy Conversion Act

§ 9152(d) violation of Ocean Thermal Energy Conversion Act

(9) Title 46, United States Code Section

§ 1903 Manufacture, Distribution, or possession with intent to manufacture controlled substances

(10) Title 49, United States Code Section

§ 46505(b) carrying a weapon on an aircraft

c. Criminal Offenses That May Preclude an Inmate's Receiving Certain Bureau Program Benefits. In addition to Sections 7.a. and 7.b. above, an inmate may be precluded from receiving certain Bureau program benefits based on an offense listed in this section. For the offenses listed below, the Sentencing Guidelines may provide little insight into the court's findings. Accordingly, rather than simply examining the base offense level or the specific offense characteristics, case managers must carefully examine the entire Offense Computation section of the PSI and, if necessary, the Offense Conduct section to determine if the offense would preclude an inmate's receiving certain Bureau program benefits based on whether the offense satisfies the standard listed in the introductory portion of Section 7.

The following offenses may preclude an inmate's receiving certain Bureau program benefits based on a variety of factors.

(1) Title 7, United States Code Section

§ 473c-1 offenses in relation to sampling of cotton

(2) Title 16, United States Code Sections

§ 5106(e)(5), (6), (7), (9), violation of Atlantic Coast Fisheries

(f)(2) Cooperative Management

(3) Title 18, United States Code Sections

§ 700 desecration of the flag of the United States

§ 751 escape from federal prison

§ 752 instigating/assisting escape from federal prison

§ 831 prohibited acts involving nuclear materials

§ 876 mailing threatening communications

§ 877 mailing threatening communications from foreign country

§ 1153 offenses within Indian Country

§ 1512(b) tampering with a witness/victim/informant

§ 1708 theft or receipt of stolen mail

§ 1792 mutiny and riot in prison

§ 1956 money laundering

§ 2117 breaking into carrier facilities

§ 2152 destruction of submarine and torpedo works

§ 2153 destruction of war materials

§ 2154 production of defective war material

§ 2155 destruction of national defense materials

§ 2156 production of defective national defense material

§ 2192 incitation of seamen to revolt

§ 2193 mutiny

§ 2247 repeat offenders

§ 2387 activities involving armed forces

(4) Title 40, United States Code Sections

§ 193f(a), (b) security of Capitol grounds and buildings

d. Conspiracy, Attempt, and Other Offenses Which Involve an Underlying Offense. Some of the statutes listed in this section cover conspiracy offenses (see, e.g., 21 U.S.C. § 846) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses (see, e.g., 21 U.S.C. §§ 846 and 963) when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would preclude the inmate from receiving certain Bureau program benefits based on any of the other portions of Section 7 of this policy, the conspiracy or the attempt offense shall also preclude the inmate from receiving the same benefits. The underlying offense will be included in the PSI and may be noted on the J&C.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a

Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) to determine whether it satisfies the standard listed in the introductory portion of Section 7. As noted in the example in section b above, if the PSI indicates that the defendant received a 2 level increase for possessing a dangerous weapon, then the offense should preclude the inmate from receiving certain Bureau program benefits; if no such enhancement was given, the offense should not preclude the inmate from receiving such benefits.

(1) Title 18, United States Code Sections

§ *241 conspiracy to deprive civil rights (if conspiracy)

§ *371 conspiracy to commit offense/fraud against U.S.

§ *372 conspiracy to impede or inure officer

§ *924 penalties for firearms violations

§ *1962 racketeering

§ *2118(d) robberies involving controlled substances

(2) Title 21, United States Code Sections

§ *846 attempt and conspiracy

§ 848 controlled substances violations as criminal enterprise

§ 963 conspiracy or attempt to violate controlled substance laws

e. Special Circumstances

Title 18, United States Code § 922(g). All offenses under 18 U.S.C. § 922(g) shall preclude an inmate from receiving certain Bureau program benefits.

*Title 18, United States Code § 2113(a). Excluding bank robbery (see Section 6.b. above), other offenses covered by 18 U.S.C. § 2113(a), (e.g., bank larceny, etc.), shall be reviewed similarly to offenses in Section 7.b. Defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if:

a firearm was discharged, a firearm or other dangerous weapon was brandished, displayed, possessed or used, or an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6).

If a defendant received such an enhancement (or one of the other enhancements involving the use or threatened use of force), the offense shall preclude the inmate's receiving certain Bureau program benefits.

Title 18, United States Code § 2243. A conviction for sexual abuse of a minor or ward shall preclude an inmate from receiving certain Bureau program benefits.

8. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are generally not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in Section 7 or offenses similar to those listed in Section 7 of this Program Statement that were committed before this date, case managers must make a determination, based on the

narrative description of the crime contained in the PSI, whether the offense involved:

the use, attempted use, or threatened use of force; the use, carrying, or possession of a dangerous weapon; a serious potential risk that force might be used against the person or property of another; or sexual abuse committed upon children.

Offenses listed in Section 6, Crimes of Violence, or offenses similar to those listed in Section 6, which were committed before November 1, 1987, shall be treated in the same manner as "new law" offenses.

9. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the U.S. Sentencing Commission drafts new guidelines. These lists will also be updated periodically to reflect statutory changes or at the Director's discretion.

/s/
Kathleen M. Hawk
Director